

**United States Department of Labor
Employees' Compensation Appeals Board**

P.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Commack, NY, Employer**

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**Docket No. 14-2048
Issued: May 13, 2015**

Appearances:
Pat Palmeri, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On September 26, 2014 appellant, through his representative, filed a timely appeal from a September 10, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly found a \$30,761.91 overpayment of compensation was created from August 1, 2007 to May 31, 2014; (2) whether it properly found appellant was at fault in creating the overpayment and therefore not entitled to waiver; and (3) whether OWCP properly determined the overpayment should be recovered by deducting \$550.00 every 28 days from continuing compensation.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 16, 1998 appellant, then a 56-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained stress and anxiety as a result of an April 7, 1998 employment incident. He alleged that his supervisors treated him in an abusive manner. On June 22, 1998 OWCP accepted the claim for depressive disorder. Appellant began receiving compensation on the periodic rolls.

OWCP periodically sent appellant EN1032 forms that requested information with respect to any additional income, changes in dependents, or receipt of other federal benefits. The form requests information for the prior 15 months. As to receipt of Social Security Administration (SSA) benefits, the EN1032 form states that appellant must report any SSA benefits received as part of an annuity under the Federal Employee Retirement System (FERS). In an EN1032 form signed on November 9, 2007, appellant responded “no” to the question as to whether he had received SSA benefits as part of an annuity for federal service. Similarly, he responded “no” in EN1032 forms dated November 10, 2008, December 19, 2009, May 31, 2011, February 11, 2012, and December 11, 2013.

On January 30, 2014 OWCP requested that SSA provide information with respect to appellant’s receipt of SSA benefits. In a response received on May 30, 2014, the SSA indicated that through July 2007 appellant had received disability benefits. SSA indicated that as of August 2007, appellant received retirement benefits and reported the difference between the SSA rate with FERS and without FERS.

By letter dated June 6, 2014, OWCP advised appellant that it had received information from SSA which showed that he had been receiving SSA benefits attributable to years of federal service under the FERS program. It stated that the portion of SSA benefits attributable to federal service required an offset from continuing compensation.

In a letter dated July 7, 2014, OWCP advised appellant of a preliminary determination that an overpayment of compensation of \$30,761.91 had occurred from August 1, 2007 to May 31, 2014. It explained that he had been receiving SSA benefits attributable to federal employment under FERS. A fiscal pay rate memorandum was enclosed that contained OWCP’s calculations as to the amount of the overpayment. OWCP also made a preliminary determination that appellant was at fault in creating the overpayment, noting that he failed to properly complete the EN1032 forms. It indicated that he had made incorrect statements on the EN1032 forms and failed to provide material information. An OWCP-20 (overpayment recovery questionnaire) form was enclosed and appellant was requested to submit the form and supporting financial documents.

On August 1, 2014 appellant’s spouse submitted a letter asking why OWCP had reviewed the forms for seven years and not checked them or contacted appellant. Appellant submitted a May 20, 2008 letter from SSA stating they had converted his benefits to retirement benefits effective August 2007 and spouse’s benefits had to be reduced. He did not submit any financial evidence.

By decision dated September 10, 2014, OWCP finalized the preliminary determinations. It found an overpayment of \$30,761.91 was created and appellant was at fault in creating the overpayment. OWCP further found the overpayment would be recovered by deducting \$550.00 from continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8116(d)(2) requires that compensation benefits be reduced by “the amount of any such social security benefits payable that are attributable to federal service.” OWCP’s procedures provide that, while SSA benefits are payable concurrently with FECA benefits, in disability cases, FECA benefits will be reduced by SSA benefits paid on the basis of age and attributable to the employee’s federal service.² It obtains information from SSA on the amount of the claimant’s benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. SSA will also provide a hypothetical SSA benefit computed without FERS covered earnings. OWCP will then deduct the hypothetical benefit from the actual benefit to determine the amount of benefits which are attributable to federal service and that amount will be deducted from FECA benefits to obtain the amount of compensation payable.³

ANALYSIS -- ISSUE 1

In the present case, the record indicated that appellant was receiving wage-loss compensation during the period August 1, 2007 to May 31, 2014 due to his accepted April 7, 1998 injury. During that same period, the evidence established that he was also receiving SSA retirement benefits attributable to his federal service. 5 U.S.C. § 8116(d)(2) states that compensation benefits are reduced by the amount of such SSA benefits attributable to federal service. OWCP had paid appellant wage-loss compensation from August 1, 2007 to May 31, 2014 without any reduction based on SSA benefits. Therefore, an overpayment of compensation was created.

To determine the amount, OWCP obtains evidence from SSA as to the SSA benefits with FERS and without FERS covered earnings. The difference represents the amount that compensation should have been reduced. In this case, OWCP obtained information from SSA and provided a memorandum that calculated the amount of the overpayment. For the period August 1, 2007 to May 31, 2014, the difference between the SSA rates with and without FERS was \$30,761.91. No contrary evidence was provided. The Board accordingly finds that the record properly documents a \$30,761.91 overpayment of compensation in this case.

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(e) (June 2009). This same section of the manual explains that if social security benefits are paid for disability rather than age, SSA benefits paid for disability shall be reduced by FECA compensation payable.

³ FECA Bulletin No. 97-09 (issued February 3, 1997). *See also P.G.*, Docket No. 13-589 (issued July 9, 2013).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA⁴ provides: “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”⁵ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁶

On the issue of fault, 20 C.F.R. § 10.433 provides in pertinent part that an individual is with fault in the creation of an overpayment who: “(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which the recipient knew or should have known was incorrect. (This provision applies only to the overpaid individual.)”

ANALYSIS -- ISSUE 2

In the present case, OWCP found appellant was at fault in creating the overpayment. It noted that he had incorrectly completed the EN1032 forms, as he had stated “no” to the specific question of whether he was receiving SSA benefits as part of an annuity for federal service. The record contains EN1032 reports dated November 9, 2007, November 10, 2008, December 19, 2009, May 31, 2011, February 11 and December 27, 2012,⁷ and December 11, 2013. As the Board indicated in *B.L.*,⁸ when a claimant incorrectly states on an EN1032 form that he did not have any SSA benefits attributable to federal service, OWCP may properly find appellant at fault for the period covered. According to 20 C.F.R. § 10.433(1) noted above, a finding of fault is proper when a claimant makes an incorrect statement as to a material fact that he or she knew or should have known was incorrect. As indicated in the legal precedent, no waiver of the overpayment is possible when the claimant is at fault in creating the overpayment.

The December 27, 2012 EN1032 form in the record, however, does not contain the page providing a response to the question as to SSA benefits. OWCP cannot find appellant at fault for making an incorrect statement as to a material fact with respect to this form. There is no evidence in the record that appellant made an incorrect statement on the December 27, 2012 EN1032. The period covered by the form is the 15-month period prior to December 27, 2012. As noted above, appellant did make incorrect statements on the February 11, 2012 and December 11, 2013 EN1032 forms. The 15-month period covered by the December 11, 2013 EN1032 form commences on September 11, 2012. Therefore, from February 12 to

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.* at § 8129(b).

⁶ *Gregg B. Manston*, 45 ECAB 344 (1994).

⁷ The record also contains a December 27, 2012 signed EN1032 form, but that document does not include the page with a response as to SSA benefits.

⁸ Docket No. 13-1422 (issued June 2, 2014).

September 10, 2012, there is no period covered by an EN1032 form with an incorrect statement as to a material fact. Based on the evidence of record, appellant cannot be found at fault during this period. The case will be remanded for proper consideration of waiver for this portion of the overpayment.

On appeal, appellant states that he does not believe he was at fault and the overpayment should be waived. For the reasons discussed above, the Board finds that the record does establish that he was at fault during the periods covered by an EN1032 form where he provided an incorrect statement. Appellant is therefore not entitled to waiver for an overpayment during the periods in which he is properly found to be at fault.

LEGAL PRECEDENT -- ISSUE 3

OWCP's regulations provide:

"When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize hardship."⁹

With respect to the submission of financial evidence, OWCP's regulations at 20 C.F.R. § 10.438 provide:

"(a) The individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA, or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary."

ANALYSIS -- ISSUE 3

As to the recovery of the overpayment, OWCP provided appellant with an opportunity to submit an OWCP-20 questionnaire and other relevant financial information. Such information would be used to consider the financial circumstances of the individual and to properly minimize hardship in recovering the overpayment from continuing compensation.

Appellant did not submit any relevant financial information. As noted above, an individual is responsible for providing information about income, expenses, and assets. When a claimant fails to submit financial information, OWCP may recover the overpayment in installments large enough to recover the debt promptly.¹⁰ The Board finds that it properly

⁹ 20 C.F.R. § 10.441.

¹⁰ See A.V., Docket No. 13-1612 (issued September 8, 2013).

determined the overpayment could be recovered by deducting \$550.00 every 28 days from continuing compensation payments.

CONCLUSION

The Board finds that OWCP properly found an overpayment of \$30,761.91 was created. Appellant was at fault in creating the overpayment, except for the period February 12 to September 10, 2012, as the evidence does not document an incorrect statement as to a material fact that he should have known was incorrect for this period. The Board further finds that OWCP properly determined that the overpayment would be recovered by deducting \$550.00 from continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 10, 2014 is affirmed with respect to fact and amount of overpayment, and recovery of the overpayment. The decision is set aside with respect to a finding of fault for the period February 12 to September 10, 2012, and remanded for proper consideration of waiver of this portion of the overpayment.

Issued: May 13, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board